88-388

Supreme Court, U.S.
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No. 88 -

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

FAIRNESS IN MEDIA, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, AND CBS, INC.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September 6, 1988

QUESTION PRESENTED

Did the Court of Appeals flagrantly flout the standards for reviewing administrative agency investigative inaction decreed in *Dunlap v. Bachowski*, 421 U.S. 560 (1975) and *Heckler v. Chaney*, 470 U.S. 821 (1985) in holding that a single, terse uninquisitive letter sent by the Federal Communications Commission to its investigative target– CBS Inc.– constituted a reasonable investigation of allegations and evidence that its control had passed illegally to its dominant 24.9 percent stockholder and chief executive officer Mr. Laurence Tisch?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Fairness in Media, the respondents Federal Communications Commission and the United States of America, and intervenor CBS, Inc..

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner Fairness In Media respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in the above-titled proceeding on June 8, 1988.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals for the District of Columbia Circuit is unreported. It is reprinted in the appendix to this petition, p. 1a, *infra*.

The opinions of the Federal Communication Commission are reported sub. nom. *Letter to William S. Paley*, 1 F.C.C. Rcd. 1025 (1986), *recon. denied*, 2 F.C.C. Rcd. 2274 (1987), and are reprinted in the appendix to this petition at p. 3a, *infra*.

JURISDICTION

Petitioner sought review pursuant to 47 U.S. Code 402 (a) in the United States Court of Appeals for the District of Columbia Circuit of the Federal Communications Commission's refusal to investigate an alleged illegal transfer of control of CBS, Inc..

The Court of Appeals entered a judgment and per curiam opinion affirming the Commission's inaction on June 8, 1988. See p. 1a, *infra*. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the District of Columbia Circuit is invoked under 28 U.S. Code 1254 (1).

STATUTES INVOLVED

1. 47 U.S. Code 310 (d).

Assignment and transfer of construction permit or station license.

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

2. 5 U.S. Code 706 (2)(A). Scope of Review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

STATEMENT OF THE CASE

Section 310(d) of the Communications Act, 47 U.S. Code 310(d), is a congressional cornerstone for the regulation of broadcasters. It requires prior approval by the Federal Communications Commission of any transfer of ownership or control of a licensed broadcaster. The importance of section 310(d) is underscored by the Commission's historical aggressiveness in pursuing alleged violations. See e.g., *Southwest Texas Public Broadcasting Council*, 85 F.C.C.2d 713, 716 (1981) (field investigation of small radio station). The Commission has invariably initiated enforcement action against a person it believes obtained control of a licensee in violation of section 310(d).

Fairness in Media (FIM) is supported by 15,000 active contributors who are automatic members. It is devoted to combating bias in the broadcast media. FIM has taped, monitored, and analyzed CBS' network for years, has filed several programming complaints with a CBS TV affiliate licensed to Durham, North Carolina (WTVD), and complained to the Commission regarding CBS' news bias.

In 1986, Loews Corporation, through its chairman, Laurence A. Tisch[1] seemingly acquired *de facto* control of CBS, Inc. by purchase of 24.9 percent of its voting stock coupled with other earmarks of corporate control without required prior approval of the Commission.

Approval proceedings conducted by the Commission afford organizations, citizens, or viewers an opportunity to protest a transfer of control as contrary to the public interest. See 47 U.S. Code 308, 309(b), (d), 310(d). Further, an affirmative finding of a control transfer would compel CBS to divest one of its television stations in either Philadelphia or New York, and radio stations in those twin cities plus Los Angeles and Chicago under the Commission's multiple ownership rules.[2]

On September 12, 1986, FIM requested the Commission to investigate the facts surrounding the apparent *de facto* control of CBS by Mr. Tisch. FIM submitted to the F.C.C. a wealth of public information that provided the Commission with investigative leads and analytical guidance. FIM noted that by August 1986, Loews had purchased approximately 25 percent of the common stock of CBS, and that Tisch was a board member. He subsequently became president and chief executive officer of the company on January 14, 1987. 2 F.C.C. Rcd. at 2275 n.1 (p. 14a, infra). It further observed the expert consensus that Mr. William Paley, founder of CBS, had earlier controlled the company with an 8 percent ownership share prior to his retirement. See also *Columbia Broadcasting System, Inc.*, 7 R.R. 298 (1951) (indicating that Paley and two other CBS board members controlled CBS).

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[1] Because Loews Corp. operates through Mr. Tisch, reference to the latter is used hereafter to denote Loews' alleged *de facto* control of CBS.

[2] See 47 C.F. R. 3555(a), (b), and NOTE 4. The rules generally proscribe ownership of co-located broadcast facilities, but "grandfather" existing combinations, subject to divestiture upon transfer of control. CBS owns grandfathered TV-radio facilities in New York, Philadelphia, Los Angeles, and Chicago. Its New York and Philadelphia TV stations are also grandfathered because of overlapping signal ranges. See *1987 Television & Cable Factbook: Stations Volume*, p. A-1264.

FIM also pointed to a published statement by the president of Loews, Mr. Tisch's brother, in the March 24, 1986 issue of *USA Today* avowing that "the eventual goal [of Loews] is to control CBS and operate it as a first-class broadcasting company the way it was and the way it can and should be."

Additionally noted was Laurence Tisch's refusals to disavow the statement when requested by CBS executives, or to sign a "standstill" agreement pledging Loews to purchase no more than 25 percent of CBS stock.

The filings included an assertion of Fred Friendly, former president of CBS News, that "We used to call it [CBS] Bill Paley's candy store. Now its the Tisch-family candy store." Reputable organs of the print media, such as *Time*, *Newsweek* and *The Wall Street Journal*, all carried stories describing Mr. Tisch as having taken control of CBS.

Stockholders of CBS also complained of a *de facto* transfer of control to Mr. Tisch. During October 1986, a stockholder's derivative suit was filed against Mr. Tisch and other members of the CBS board of directors in the United States District Court of the Virgin Islands, Division of St. Croix. *CBS, Inc. derivatively by R.B. Minkoff v. Paley, et al. (Civ. Action No. 86/229).* The complaint alleged, *inter alia*, that "Tisch has been able to acquire 'creeping control' of CBS by purchasing shares on the New York Stock Exchange and otherwise without paying the premium for such control that is warranted, all of which is to the detriment of CBS and its stockholders."[3]

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[3] Complaint, paragraph 18 (c) (iv). The *Minkoff* case has been transferred to the Southern District of New York.

The chorus of concern over the *de facto* transfer of control question stemmed from a fractious meeting of the CBS board on September 10, 1986.[4] On that date, Mr. Thomas A. Wyman, then chairman of the board, president and CEO, urged consideration of an overture from Coca-Cola to purchase CBS. Mr. Tisch opposed the Wyman proposal. The board then discussed whether CBS should remain independent or be offered for sale. A consensus emerged in favor of independence, at least temporarily. Board members sought specific assurances from Tisch that Loews would not seek to dictate or direct the actions of CBS' board. Tisch responded that CBS should continue to operate as an independent company.

Board members inquired whether Loews intended to seek control of CBS. Tisch denied such a present intention, but subsequently made clear that he did not disavow such a future intention. In the absence of Paley and Tisch, the board members agreed to name Tisch CEO during a transition period in which a permanent successor to Wyman would be sought. The transition period was envisioned as a "few months," but Tisch became president and permanent CEO on January 14, 1987. 2 F.C.C. Rcd. at 2275 n. 1 (p. 14a, infra). According to Mr. Wyman, the CBS search committee to replace Mr. Tisch never met.[5]

The Commission responded to FIM's request on September 17, 1986, by sending a terse, unprobing letter to CBS noting:

> On September 12, 1986, this agency received a complaint, a copy of which is enclosed, from a group called Fairness in Media, which alleged that an unauthorized transfer of CBS, Inc., had occurred by virtue of the acquisition of nearly 25 percent of CBS stock by Loews, Inc. In addition, there has, of course, been widespread media coverage of the various recent changes in the management of CBS, Inc.

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[4] The narrative is based on the Minutes of the board of directors meeting supplied by CBS.

[5] See N.Y. Post, Jan. 22, 1988.

> The purpose of this letter is to afford CBS, Inc., an opportunity to address, in detail, the allegation that there has been a transfer of control.

At no time did the Commission request FIM to submit affidavits or sworn oral testimony to bolster the transfer of control allegations sent to CBS by the Commission.

CBS responded to the Commission's letter on October 1, 1986. Prior to the response, astute legal counsel would have informed CBS directors that confessing a *de facto* transfer of control would require divestiture of four CBS radio stations and either its New York or Philadelphia television station under the Commission's multiple ownership restrictions.[6] A confession also would expose many board members to damages in the pending stockholders' derivative suit, and could lead to revocations of CBS broadcast licenses or denials of license renewals. See e.g., *Stereo Broadcasters Inc.*, 87 F.C.C. 2d 87 (1981).

It was unsuprising, therefore, that acting chairman of the CBS board, Mr. William Paley, authored a letter to the Commission earnestly denying any transfer of control.

Prior to the October 1, 1986 submission by CBS, three of its officers, including Newton Minnow, and former F.C.C. Chairman and CBS lawyer, Richard Wiley, lobbied *ex parte* with the full F.C.C. against an investigation of the *de facto* transfer of control question. As reported in *The Wall Street Journal* of September 25, 1986, CBS insisted that Tisch had not acquired control, and a CBS lawyer, Lawrence Secrest, boasted that "Given the circumstances, it would be astounding if the Commission found anything other than that there was no transfer of control."

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[6] See p. 4, n. 2, supra.

On October 20, 1986, the Commission lettered Mr. Paley its conclusion that no *de facto* transfer of control of CBS had occurred. *Letter to William S. Paley*, 1 F.C.C. Rcd 1025 (p. 6a, infra). Prior to that finding, the Commission declined to question or cross-examine any present or former CBS director, official or employee regarding the control issue, including Wyman or Tisch. It declined to ask any corporate law expert or broadcast maven whether 25 percent ownership of CBS stock empowered Tisch to control the election of the board of directors. They are elected annually by plurality vote.[7] It declined to address the financial conflicts of interest by persons preparing the CBS response, including Paley and Minnow. The outstanding *Minkoff* suit alleges they wrongly permitted Tisch to acquire control of CBS without paying a "control premium." Moreover, five CBS broadcast divestitures would be required if a *de facto* transfer of control is found.

The Commission rejected the view that a *de facto* transfer of control to Tisch had occurred because he was the dominant minority shareholder of CBS owning approximately 25 percent of its shares. The Commission insisted that legal control of CBS remained in stockholders owning the other 75 percent of the company. Additionally, the Commission believed no clear evidence showed Tisch dominated other CBS board members or management of the company. Accordingly, the Commission declared no further investigation was warranted beyond the self-serving response of CBS. 1 F.C.C. Rcd at 1026-1027 (p. 9a, infra).

FIM petitioned the Commission for reconsideration. It sought to stimulate the Commission's investigatory appetite regarding the *de facto* control issue by appending additional information. It fortified the allegations that Tisch was charting CBS policy, revamping CBS operations, appeared in control to unbiased outsiders, and possessed the power to win a proxy fight against any disagreeable board member seeking re-election.

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[7] See CBS, Inc. By-Laws, Article II, Section 1.

The Commission denied FIM's petition for reconsideration. 2 F.C.C. Rcd 2274 (1987) (p. 14a, infra).

FIM petitioned the Court of Appeals to review the Commission's allegedly arbitrary and capricious investigatory slumber. After oral argument, the Court in a per curiam unpublished opinion denied the petition on June 8, 1988. It announced that:

> "The facts before the Commission justified the determination that no transfer triggering a need for immediate investigation had occurred. Were agencies forced to prolong inquiries and to spend large resources whenever confronted with allegations, speculation or prediction of the kind petitioner presses, the expeditious scheduling of agency agendas and efficient execution of agency business would be severely impeded."

REASON FOR GRANTING THE WRIT

The Court of Appeals flouted the unambiguous teachings of this Court in *Dunlap v. Bachowski*, 421 U.S. 560 (1975), and *Heckler v. Chaney*, 470 U.S. 821 (1985) applicable to reviewing investigative inaction by administrative agencies.

The three major television networks in the United States– ABC, NBC, and CBS– exercise pivotal influence over public opinion and the functioning of the electoral process. It is thus exceptionally important that any transfer of control of a network be previously scrutinized by the Federal Communications Commission under 47 U.S.C. 310(d) to insure that controlling persons satisfy public interest standards.

Recently, when ABC was acquired by Cap Cities and NBC was sold to General Electric, the acquiring companies received prior scrutiny and approval by the Commission. But the decision of the Court of Appeals in this case wrongly and unfairly sanctions circumvention of section 310(d) by CBS by flouting standards for reviewing investigative inaction expounded in *Dunlap v. Backowski*, 421 U.S. 560 (1975), and *Heckler v. Chaney*, 470 U.S. 821 (1985).

In the former case, this Court concluded that the arbitrary or capricious standard set forth in 5 U.S. Code 706 (2)(A) should govern judicial review of non-enforcement decisions of the Secretary of Labor regarding union election law violations. That standard is to be applied to the statement of reasons elucidated by the Secretary for his declination to initiate suit. In applying the standard, a reviewing court must consider whether the withholding of law enforcement action was based on a consideration of relevant investigatory or enforcement factors, or whether there was a clear error in judgment. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1972).

The *Heckler* ruling did not disturb these teachings. It held that there is an interpretive presumption against judicial review of investigative or enforcement inaction under the Administrative Procedure Act. But where, as here, that presumption is overcome by the mandatory language and purpose of section 310(d), a view tacitly accepted by the Court of Appeals, then the *Dunlap* precedent governs the legal analysis.

On the merits, the Court of Appeals blatantly misapplied the arbitrary or capricious standard of review. It blessed the Commission's inaction for spurious reasons not advanced by the agency itself. The Court insisted that the Commission's enforcement resources would be dissipated and the efficient execution of its business severely impeded if it were required to pursue FIM's allegations and evidence affirming Mr. Tisch's control of CBS.

But the F.C.C. never claimed such prospective harm to its operations. That is because to require the F.C.C. to investigate further in this case involving a broadcast giant would not suggest the Commission should pursue transfer of control allegations regarding less powerful broadcasters with equal thoroughness.

Further, the Commission's entire investigation consisted of a single, terse letter to CBS coupled with a self-serving response.

To require a modicum of additional investigative exertion to avoid an arbitrary or capricious emblem will not exhaust the Commission's enforcement resources. The F.C.C. has never declared it would.

The Commission's investigative lassitude in this case was manifestly arbitrary based on the evidence before it. Mr. Tisch is chief executive officer, president, a member of the board of directors, and the largest stockholder of CBS owning a 24.9 percent share.

A 24.9 percent stockholder is ordinarily endowed with power to control *de facto* a widely held corporation such as CBS in which the second largest stock owner, Mr. Paley, owns but an 8 percent share. See *Essex Universal Corp. v. Yates*, 305 F.2d 572, 579 (2d Cir. 1962) ("28.3 percent of the voting stock of a publicly owned corporation is usually tantamount to majority control...").

Mr. Tisch, as a board member, CEO, and president of CBS, exercises a dominant voice in its policy decisions.

Mr. Tisch has dismissed the president of the publishing division of CBS and its 14-member corporate staff. He likewise ousted Van Gorden Sauter as president of CBS news. Power to set personnel policy and take personnel actions, the Commission has declared, is an exceptionally important earmark of control. *Stereo Broadcasters, Inc.*, 87 F.C.C.2d 87, 93 (1981).

With regard to finances and corporate direction, Tisch has sold CBS' textbook publishing division for $500 million, its music publishing division for $125 million, its records group to Sony for $2 billion, and CBS magazines to a management group for $650 million. The latter two mammoth sales, as the F.C.C. must recognize, 2 F.C.C. Rcd at 2275 n. 7, overturned earlier opposition by the CBS board to such actions. Indeed, after the $2 billion Sony sale, a CBS director was quoted in the November 20, 1987 *The Wall Street Journal* as lamenting: "When

you've got (Tisch and Paley) sitting there at the table with one-third of the shares who want to do (a deal), how do you fight it? The deck is well-stacked here."

Tisch's sales of CBS' records and magazine groups cut CBS' profits by approximately 48 percent and CBS' revenues by approximately 40 percent based on its 1986 Annual Report. The Commission has identified authority over corporate policy and finances as key earmarks of *de facto* control. See *Stereo Broadcasting, Inc.*, supra.

Thomas Wyman, former chairman, CEO and president of CBS characterized Tisch's asset sales as an "instant dismemberment" of CBS in a recent lecture at the Yale School of Organization and Management.[8] A stock analyst has stated that Tisch "redesigned CBS overnight. With the sale of the record division, Tisch has undone two decades of expansion." [9]

Mr. Wyman negotiated a "Golden Parachute" arrangement with CBS triggered when any entity acquired 25 percent of CBS' common stock. That arrangement strongly suggested Mr. Wyman believed that amount of stock ownership enabled an entity to control CBS or to dictate personnel.[10] After Wyman's discharge, he negotiated an exceptionally lucrative severance agreement with CBS, albeit not expressly a "Golden Parachute."

The *Minkoff* suit alleges Tisch has acquired *de facto* control of CBS, Inc. with his 24.9 percent share of its common stock without paying a control premium.

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[8] See New York Post, 1/22/88.

[9] See Forbes, 1/11/88.

[10] See 1986 Proxy Statement of CBS.

During the Yale School of Organization and Management lecture, Mr. Wyman asserted that Tisch disingenously denied intending to control CBS through his 25 percent stock ownership to avoid paying a control premium of perhaps $50 per share; and, that the search committee selected to find a replacement for Tisch as CEO never met.

Despite this information, the Commission closed down its investigation of the transfer of control issue after receipt of a self-serving statement from CBS, an entity with glaring conflicts of financial interest in the matter. The F.C.C. conducted no inquiry to substantiate the accuracy of CBS's response. It undertook no analysis of whether Tisch's 24.9 percent stock share as a practical matter endowed him with *de facto* control of CBS.

In sum, the Commission's investigation was a sham that demands judicial denunciation as arbitrary under the precedents of this Court. The Court of Appeals flagrantly erred in holding otherwise.

CONCLUSION

For the reasons previously amplified, this petition for certiorari should be granted to prevent agencies from *de facto* nullifying laws through investigative inaction in defiance of precedents proclaimed by this Court.

Respectfully submitted,
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September 6, 1988

APPENDIX

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 87-1217

Fairness in Media,
Petitioner

v.

Federal Communications Commission

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BEFORE: ROBINSON, RUTH B. GINSBURG, AND SENTELLE, Circuit Judges

JUDGMENT

This petition for review was considered on the record from the Federal Communications Commission and was briefed and argued by counsel. The court, upon full consideration of the case, has determined that its disposition does not warrant a published opinion. *See* D.C. Cir. R. 14(c).

Assuming, but not deciding, that petitioner is positioned to invoke court review, we are satisfied that the Commission dealt reasonably and appropriately with the merits of the complaint. The facts before the Commission justified the determination that no transfer triggering a need for immediate investigation had occurred. Were agencies forced to prolong inquiries and to spend large resources whenever confronted with allegations, speculation or prediction of the kind petitioner presses, the expeditious scheduling of agency agendas and efficient execution of agency business would be severely impeded. Accordingly, it is

ORDERED and ADJUDGED that the petition for review be denied. It is

FURTHER ORDERED, by the Court, on its own motion, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. R. 15. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

Before the
Federal Communications Commission
Washington, D.C. 20554

October 16, 1986

BY DIRECTION LETTER

Mr. William S. Paley
CBS Inc.
51 West 52nd Street
New York, NY 10019

Released: October 20, 1986**

Dear Mr. Paley:

This is in reference to a "Petition and Complaint" filed by Fairness In Media ("FIM") on September 12, 1986, FIM's Addendum to that Petition and your comments on the matters raised by FIM which were filed October 1, 1986. In its filing, Fairness In Media requested the Commission to investigate whether an unauthorized *de facto* transfer of control of CBS Inc. ("CBS") to Loews Corp. ("Loews") and its Chairman, Laurence A. Tisch had taken place. Further, it urged that the Commission find that such a transfer of control had taken place and require CBS, Loews, and Tisch to comply with Section 310(d) of the Communications Act of 1934, as amended, by filing the requisite application for Commission approval of the alleged transfer of control.

In support of its request, FIM asserted that, in July 1985, Loews purchased 5% of CBS's common stock and that, pursuant to an agreement reached between the CBS Board of Directors and Loews in October 1985, Loews purchased additional stock to the extent that by, August 1986, its ownership interest in CBS reached nearly 25%. Furthermore, it pointed to statements by Preston Robert Tisch, (President of Loews Corp.), present and former CBS officers and directors, and others to

the effect that Laurence Tisch intends to assert control over the corporation. Copies of articles that have appeared in various publications concerning these events were attached to the FIM filing.

On September 30, 1986, FIM filed an "Addendum to Petition and Complaint" asserting that subsequent to its original finding Laurence Tisch had become the Chief Executive Officer of CBS and had exercised control over CBS by, for instance, orchestrating the removal of the existing Chairman of CBS and making himself its chief executive. Furthermore, it asserted that Mr. Tisch had in fact, been exercising significant control over CBS since December 1985. In support of this allegation FIM argued that cost control measures implemented by CBS in December 1985, were "similar to those implemented by CNA Financial Corporation during the course of its takeover by Loews." FIM again requested that the Commission investigate the situation and require CBS Inc., Loews Corp., and Laurence Tisch to comply with Section 310(d) of the Communications Act. Additionally, the Addendum asked that the Commission impose sanctions in the event it determined that an unauthorized transfer of control had taken place.

Subsequent to FIM's original filing, the Chief, Mass Media Bureau, sent a letter to CBS notifying it of the Commission's receipt of the Petition and Complaint and taking note of the press coverage of the management changes at CBS. The letter afforded CBS an opportunity to respond. On October 1, 1986, CBS filed its comments signed by you denying that an unauthorized transfer of control over CBS had taken place and a memorandum of law in support of these comments. Generally, CBS asserted that management authority over the corporation is exercised by its Board of Directors acting on behalf of the corporation's shareholders. Among the Board's management responsibilities is the oversight of management. In this regard, you stated that on September 10, 1986, the CBS Board, consisting

primarily of outside directors, met and that its outside directors together with a single inside director (Walter Cronkite), decided to replace the Chief Executive Officer. This change resulted in the departure of the existing C.E.O. and the election of Laurence Tisch to the position. According to your response, the outside directors and Mr. Cronkite voted to appoint Mr. Tisch as acting CEO on a temporary basis until a new CEO is selected. The Board also appointed a "management committee" chaired by Mr. Tisch and "consisting of a majority of outside directors" to which Mr. Tisch would report between Board meetings. This, you asserted, will "further fortify the Board's authority over the operations of the corporation." The Board also named you as Acting Chairman. CBS contended that no transfer of control over the corporation had occurred and that neither you nor the other Board members "intended to surrender control of CBS to Mr. Tisch, nor did he intend to assume such control." Finally, you assert that there exists no agreement between Mr. Tisch and you (who together control approximately 33% of the shareholders' votes) with respect to the voting of stockholdings or the positions that you two will take on matters to come before the Board.

The Communications Act contains no definition of "control" for the purposes of Section 310(d) and the Commission has recognized that "there is no precise formula by which control may be ascertained." (footnote omitted.) *In re: Tender Offers and Proxy Contests*. 51 Fed. Reg. 9794,. (March 21, 1986), 59 RR 2d 1536, 1542. As recent Commission decisions and policy statements have recognized, the locus of control in a publicly-held corporation can be difficult to place given the varying and diffuse degrees of working control typically exercised at different levels of such corporations. Id. at 1543. While a change in ownership is an important factor in determining whether control has been transferred it is not necessarily determinative. Id. at 1542. Nor does the Commission consider changes in a board of directors over a period of time to generally constitute a transfer

of control. Id. at fn. 40. Rather, the determination as to issues of control, "... is a complex task which must be done on a case-by-case basis." *Storer Communications Inc. v. F.C.C.*, 763 F.2d 436, 442 (D.C. Cir. 1985).

In the instant matter, application of our prior decisions concerning *de facto* transfers of control to the facts presented compels our determination that, as of the present time, no *de facto* transfer of control over CBS Inc. has occurred. Here we are not dealing with an assertion that *de jure* control over CBS Inc. has shifted. Instead, allegations have been raised that *de facto* control over the corporation has been transferred to Loews and, by extension, to Mr. Tisch. By definition, *de facto* control relies on facts, on events that have occurred. Unlike a *de jure* transfer of control, where the mere potential to exercise majority vote requires prior Commission consent and in which an abstention from any activity evidencing control or influence does not excuse noncompliance, a finding that a *de facto* transfer of control has occurred depends largely upon a review of the actual operation of the licensee – not upon the potential for some hypothetical future exercise of control. *See News International, PLC*, 97 FCC 2d 349 (1984). Other than cases in which conduct demonstrates that control has actually been exercised, the Commission will find a *de facto* transfer of control to a minority shareholder only where there is clearer evidence of that minority shareholder/director's dominance. As an example of the latter, in *George E. Cameron, Jr.*, 91 FCC 2d 870 (Rev. Bd. 1982), *recon. denied*. 93 FCC 2d 789 (1983), *applications for review dismissed as moot*, FCC 84-367 (August 1, 1984), the Review Board found that a 49% shareholder, director and officer possessed *de facto* control of the licensee corporation because he: a) had a 49% interest in the licensee's parent company with an option to increase his interest to nearly 100%; b) was the managing partner of the licensee's parent company and president of the subsidiary/licensee; and, perhaps most importantly, c) held judgments against other principals which, if exercised, "would financially

cripple them." *Id.* at 889-890. Additionally, this individual's "long-time subaltern" had been made the station's general manager. This "total dominance" was found to constitute *de facto* control. Similarly, in *Western Gateway Broadcasting Corp.*, 16 FCC 274 (1951), a minority shareholder's demonstrated ability to control both his own and his relatives' shares - relatives who were characterized as completely subservient and "for all practical purposes...his pawns or dummies..." - resulted in a finding that the subject minority shareholder had acquired *de facto* control of the licensee without the Commission's consent.

In the instant matter, the Commission is unable to conclude that a *de facto* transfer of control has occurred or that the matters raised by FIM warrant further investigation. Loews is a minority CBS shareholder. More than 75% of the voting power and ownership of CBS remain with the general shareholders who "retain ultimate and legal control" of the corporation. *See Committee for Full Value of Storer Communications, Inc.*, 101 FCC 2d 434, 445, *aff'd sub nom. Storer Communications, Inc. v. F.C.C., supra; cf. Turner Broadcasting System, Inc.*, 101 FCC 2d 322, (1985). Nor is there, at present, any evidence before the Commission that would suggest that Mr. Tisch, himself a minority shareholder, has the sort of influence with the remaining shareholders that the Commission in the past has found to constitute *de facto* control. *See George E. Cameron, Jr., supra; see also Western Gateway Broadcasting Corp., supra.*

This case is therefore unlike *Metromedia, Inc.*, 98 F.C.C. 2d 300 (1984), *recon. denied.*, 56 Radio Reg. 2d (P&F) 1198 (1985), *appeal dismissed*, California Ass'n of the Physically Handicapped v. FCC, 778 F.2d 823 (D.C. Cir. 1985), in which there was no dispute that John Kluge, who owned 26% of the stock of Metromedia and was the President, Director, Chairman of the Board, Chief Executive Officer and largest stockholder, held *de facto* control of the corporation. For 25 years, Mr. Kluge had had the power to determine who would serve on

Metromedia's Board of Directors. He had nominated a majority of the then current members of the Board and no Board members were nominees of anyone else. Mr. Kluge also controlled Metromedia's management proxy process. In every year since 1959, Mr. Kluge had been designated proxy in management's annual proxy solicitations. Mr. Kluge had had the power to control the voting of virtually all of the Company's stock at every annual meeting during this period. And in Form 10–K Reports and Proxy Statements filed with the Securities and Exchange Commission, Mr. Kluge had been identified as the controlling party of *Metromedia*, See 98 F.C.C.2d at 303–306.

Nor could we conclude a *de facto* transfer of control occurred were we to accept the position urged upon the Commission in CBS's comments filed in Tender Offers and Proxy Contests, *supra*. There, CBS maintained that the Commission's decision in Storer should be limited to its facts because "where stockholders are widely dispersed among numerous individual shareholders and passive institutional investors, actual operational authority – the *de facto* control with which the Communications Act is concerned – frequently rests with the Board." CBS Comments in MM Docket No. 85–218 at 46. Assuming, arguendo, that the locus of control of CBS is in its Board of Directors, there is no evidence that the events described in the pleadings constituted a transfer of control for the purposes of Section 310(d). In the instant case it is undisputed that the CBS Board, excluding Messrs. Tisch and Paley, voted to disapprove a proposal by the corporation's then Chief Executive Officer to respond positively to any interest evidenced by the Coca–Cola Company in the purchase of CBS; voted to accept the then CEO's resignation; and, elected Mr. Tisch acting CEO and Mr. Paley acting Chairman of the Board until a new CEO, President and Chairman for CBS were found. Moreover, the Board appointed a Management Committee to "review the Corporation's operations during such transition period and to advise the acting Chief Executive Officer with respect thereto..." While Mr.

Tisch clearly plays an important role in the operations of CBS, the Commission possesses no evidence that Mr. Tisch alone or in privity with other Directors under his domination, has obtained ultimate control of CBS. Nor does his appointment by the Board to act as Chief Executive Officer constitute the kind of conduct that by itself demonstrates *de facto* control. The mere fact that Mr. Tisch's accession may affect working control of CBS does not mean that this event constitutes a transfer of control. See Tender Offers and Proxy Contests, *supra* at 1543. As the Court of Appeals has stated:

> Corporate officers or station managers may exercise substantial day-to-day working control; yet FCC approval would not be required before a corporation was allowed to replace such personnel. Directors may also change on an evolutionary basis, e.g., several directors may retire or resign over the course of a year. The Commission only requires that such evolutionary changes be reported on an annual Ownership Report.
>
> *Storer Communications, Inc.*, v. F.C.C., *supra* at 442.

We are confronted with no evidence that any event transpired in the instant situation beyond those described above. A corporate Board, dissatisfied with the performance of an incumbent CEO, replaced him with another individual. That individual's actions were made subject to review by a Management Committee of the Board – (composed of the individual and four other Board members whose terms predated that of the new CEO); to approval or disapproval by the Board that appointed him; and, ultimately, to review by the company's shareholders. Most critically, the actions that have taken place have occurred in the context of a corporation that has an active and independent Board of Directors that has been and remains openly antagonistic to CBS coming under the domination of any outside party. We conclude that the events, to date, do not constitute a transfer of control within the meaning of Section 310(d) of the Communications Act of 1934, as amended.

BY DIRECTION OF THE COMMISSION*

William J. Tricarico
Secretary

*Commissioner Dennis not participating

**Note: Note: This item, although publicly released on the date indicated, was not included in the appropriate volume of the Federal Communications Commission Record.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re By Direction Letter

Regarding Control of CBS Inc.

MEMORANDUM OPINION AND ORDER

Adopted: March 20, 1987; Released: March 20, 1987*

1. On October 20, 1986, the Commission, upon consideration of allegations raised by Fairness in Media (FIM) that *de facto* control of CBS Inc. (licensee of several radio and television stations), had been transferred to Loews Corp., owner of 24.9% of CBS stock, or to Loews' Chairman, Laurence A. Tisch, without prior Commission authorization, concluded that the evidence did not support a finding of a transfer in violation of Section 310(d) of the Communications Act of 1934, as amended. *Letter to William S. Paley*, 1 FCC Rcd. 1025. 61 RR 2d 413 (1986).

2. We now have before us: (1) a Petition for Reconsideration of this matter, filed by FIM on November 14, 1986; (2) a response filed by CBS on November 24, 1986 ("Opposition of CBS Inc. to Petition for Reconsideration"); and (3) further comments by FIM ("Reply to Opposition to Petition for Reconsideration") filed December 9, 1986.[1]

3. FIM repeats many of the arguments and events cited in its initial complaint. In addition, FIM makes certain new claims in support of its contention that the Commission should reverse its original finding or, alternatively, investigate further whether a *de facto* transfer of control has taken place:

> (a) A minority owner such as Loews, with its 24.9% interest in CBS, has a "high probability" of defeating "any

Board member in a proxy fight over re-election if a dispute arose over CBS policy", and thus "elicit[s] obedience" from other Board members wishing to remain on the Board.

(b) A minority owner of such proportion, mounting a publicity campaign which would be prohibitively expensive to oppose, may directly control a corporation's policy decisions by combining its votes with those proxies it can attract from widely scattered small shareholders.

(c) Twenty-five percent ownership of a widely held corporation is generally "sufficient to gain control," as evidenced by the 25% de jure standard employed by the Federal Bank Holding Company Act, 12 U.S.C. 1841, and by the 28.3% standard adopted by one judge of a three-judge panel interpreting New York corporation law incidental to analyzing a contract dispute in *Essex Universal Corp. v. Yates*, 305 F.2d 572, 579 (2d Cir. 1962).

4. The Commission has historically rejected a formulistic approach based on a particular level of minority holdings in its *de facto* control analyses.[2] FIM has not demonstrated here why such an approach should now be adopted. In addition, the Commission has recently made it clear that conjecture about the outcome of possible proxy battles is not a basis for determining control.[3] Furthermore, whatever the relevance of the statute and cases FIM cites, Loews' ownership of just less than the 25% benchmark does not in any event reach the levels established therein.[4]

5. To bolster its claims regarding the control wielded by Loews as a 24.9% stockholder of CBS, FIM makes several additional observations:

(a) The CBS Board minutes of September 10, 1986,[5] and the fact that no successor CEO has yet been selected,[6] show that "CBS' Board perceive[s] Tisch as the dominant force in the management hierarchy and as capable of asserting his will whenever he chooses."

(b) "Tisch has reshaped CBS management in his own image," as evidenced by the "revolutionary changes initiated

by Mr. Tisch since he became CEO. Changes of this nature are unlikely to have been unanimously approved by the other Board members and therefore must have been initiated by Mr. Tisch acting unilaterally.

(c) As to the Commission's finding that the CBS Board members continue to be active and independent, "there is no evidence that the CBS Board ever acted contrary to the wishes of Mr. Tisch," or that "Mr. Tisch as CEO ever sought the advice of CBS Board Members or altered a single managerial or policy decision because of the views of a Board member." In addition, the Tisch family's history in relation to Loews Corp. shows that "Tisch knows how to wield minority stock ownership to assert corporate control."

6. We carefully examined the September 10 Board minutes before issuing our October 20, 1986 ruling. At that time we saw nothing of decisional significance in the passage FIM highlights and find no reason to alter that conclusion. Moreover, Mr. Tisch's appointment as president and chief executive officer after holding the post for four months in a temporary capacity does not raise a suspicion that Board members have in any way relinquished their independent judgment. Considering CBS' denial and the cases cited in its Opposition, we reject the idea that the changes initiated by Mr. Tisch were outside the scope of this authority as CEO or were made in opposition to the Board's wishes. FIM's characterization of the CBS Directors as powerless to do anything but retain their positions on the Board is not supported by the evidence.[7]

7. Based on our review of the entire record in this case, we find that further Commission action is unwarranted at this time. Neither the initial papers before us nor the Petition for Reconsideration contain evidence of specific exercises of control by Mr. Tisch, and therefore by Loews Corp., or evidence that the Board of CBS no longer has the ability to act independently, or that the other shareholders have relinquished their franchises to Mr. Tisch, sufficient to demonstrate that a transfer, within the meaning of the statute, has taken place. Furthermore, the Peti-

tion for Reconsideration reveals no error of law that would persuade us to deviate from our conclusion in the first instance.

8. Accordingly, for the reasons stated above, IT IS ORDERED, that FIM's Petition for Reconsideration IS DENIED.[8]

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico Secretary

*Note: This item, although publicly released on the date indicated, was not included in the appropriate pamphlet of the Federal Communications Commission Record.

FOOTNOTES

1 In addition, we take notice of the January 14, 1987, action by the CBS Board appointing Laurence Tisch as president and chief executive officer and appointing William Paley as Chairman.

2 *News International, PLC*, 97 FCC 2d 349, 355 (1984); *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981); WHDH, Inc., 17 FCC 2d 856, 863 (1964), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 903 (1971).

3 See, generally, *Tender Offers and Proxy Contests*, 59 RR 2d 1536, 1583 (1986) (considering transfer of control issues in declining to adopt generic procedures applicable in all situations involving proxy contests). "[W]e believe there are many situations in which the use of proxies to elect members of the Board would not constitute a change in control," *id.* at 1544; and "we do not expect that the use of a proxy mechanism solely in conjunction with matters other than the election of directors would raise transfer of control issues." *id.* at 1544, n. 39.

4 We also note that while the Bank Holding Company Act contains a "bright line" of 25% ownership (12 U.S.C.

184(a)(2)(A)) for determining control, it provides for case-by-case analysis in other situations (12 U.S.C. 1841(a)(2)(C)). FIM's reliance on it is curious as Loews does not quite meet the "bright line" level of 25% ownership in CBS and, accordingly, even the Bank Holding Company Act would apparently require the type of analysis performed by the Commission in this matter.

5 These minutes reflect that Board members sought and received Mr. Tisch's assurance that Loews would not seek changes that might make CBS a Loews subsidiary or attempt to dictate or direct the actions of CBS' Board.

6 See note 1, *supra*.

7 For whatever value they may be, the news clippings submitted with FIM's filings to bolster its allegations are selective, citing only alleged instances of Mr. Tisch's control while omitting other news reports detailing instances in which the Board apparently rejected the advice of Mr. Tisch. See, e.g., *Newsweek*, Nov. 24, 1986, at 7, col. 4 (Tisch proposal to sell the CBS Record Group for in excess of $1 billion rejected by Board); see also N.Y.Times, Nov. 20, 1986, at D5, col. 6 (report of Mr. Tisch's apparent shift to the CBS Board's position rejecting a $600 million offer for CBS' magazine business).

8 FIM also requested oral argument on its Petition for Reconsideration. We do not find that oral argument will significantly contribute to our understanding of the matters raised in the Petition. Accordingly, we will deny that request.